

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Armour & Company :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years 1970 & 1972 & 1976-1978. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 4th day of April, 1985, he served the within notice of Decision by certified mail upon Armour & Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Armour & Company  
Greyhound Tower  
111 W. Clarendon  
Phoenix, AZ 85077

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
4th day of April, 1985.

David Parchuck

Annunzio R. Spadaro

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
Armour & Company :  
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Franchise Tax under Article 9A of the Tax Law for :  
the Years 1970 & 1972 & 1976-1978. :  
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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 4th day of April, 1985, he served the within notice of Decision by certified mail upon John A. Greene, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. Greene  
Tax Department - 0301  
Greyhound Tower, 111 W. Clarendon  
Phoenix, AZ 85077

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
4th day of April, 1985.

David Parchuck

James A. Deane  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

April 4, 1985

Armour & Company  
Greyhound Tower  
111 W. Clarendon  
Phoenix, AZ 85077

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
John A. Greene  
Tax Department - 0301  
Greyhound Tower, 111 W. Clarendon  
Phoenix, AZ 85077  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ARMOUR & COMPANY	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1970,	:	
1972 and 1976 through 1978.	:	

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Petitioner, Armour & Company, Tax Department - Station 0301, Greyhound Tower, Phoenix, Arizona 85077, filed a petition for redetermination of a deficiency or for refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the years 1970, 1972 and 1976 through 1978 (File No. 36822).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 24, 1984 at 1:15 P.M. with all briefs to be submitted on or before August 14, 1984. Petitioner appeared by John A. Green, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined that the interest income from a second-tier subsidiary was not subsidiary capital within the meaning of Tax Law § 208.9(a)(1) and therefore, properly included the interest income received from the second-tier subsidiary in petitioner's New York entire net income.

II. Whether petitioner had reasonable cause for its failure to file a report of federal tax changes.

FINDINGS OF FACT

1. During the years 1976 and 1977, petitioner owned one hundred percent of the outstanding stock of Armour-Dial, Inc. Armour-Dial, Inc., in turn, owned one hundred percent of the outstanding stock of Armour Pharmaceutical Company.

2. Petitioner filed a New York State Corporation Franchise Tax Report for the fiscal year ended January 1, 1977. On this report, petitioner listed Armour-Dial, Inc. on its schedule of subsidiary capital and allocation. Armour Pharmaceutical, Inc.'s capital was included in this schedule as a portion of Armour-Dial, Inc. On its schedules attached to this report, petitioner determined that its interest expense attributable to subsidiary capital was \$1,270,714.00. Further, petitioner reported that its interest and dividends received from subsidiary capital were as follows:

<u>Subsidiary</u>	<u>Interest</u>	<u>Dividends</u>	
Armour-Dial, Inc.	\$ 134,900	\$11,332,000	
Armour Pharmaceutical Company	<u>2,410,000</u>	<u>-0-</u>	
TOTAL	\$2,544,900	\$11,332,000	\$13,876,900

3. Petitioner filed a New York State Corporation Franchise Tax Report for the year ended December 31, 1977. On this report, petitioner listed Armour-Dial, Inc. on its schedule of subsidiary capital and allocation. Armour Pharmaceutical, Inc.'s capital was included in this schedule as a portion of Armour-Dial, Inc. On the schedules attached to this report, petitioner determined that its interest expense attributable to subsidiary capital was \$1,396,711.00. Further, petitioner reported that its interest and dividends received from subsidiary capital were as follows:

<u>Subsidiary</u>	<u>Interest</u>	<u>Dividends</u>	
Armour-Dial, Inc.	\$ -0-	\$14,541,000	
Armour Pharmaceutical Company	1,230,000	-0-	
Armour Incorporated (Panama)	<u>-0-</u>	<u>676,112</u>	
TOTAL	\$1,230,000	\$15,217,112	\$16,447,112

4. For the year ended December 30, 1978, petitioner did not report any interest income from Armour Pharmaceutical Company as interest and dividends received from subsidiary capital.

5. On December 28, 1981 the Audit Division issued five notices of deficiency to petitioner, Armour & Company, as follows:

<u>Year</u>	<u>Tax Deficiency</u>	<u>Interest</u>	<u>Penalty</u>	<u>Credit Applied</u>	<u>Total</u>
1970	\$ 2,876.00	\$ 1,981.00	\$1,079.00	\$3,863.00	\$ 2,073.00
1972	979.00	680.00	367.00		2,206.00
1976	22,931.00	10,072.00	-0-		33,003.00
1977	6,168.00	2,185.00	-0-		8,353.00
1978	3,492.00	940.00	-0-		4,432.00

6. The asserted deficiencies of tax, penalty and interest for the years 1970 and 1972 were premised upon petitioner's failure to file a timely report of Federal audit adjustments. The asserted deficiencies of tax for the years 1976 and 1977 were premised upon the Audit Division's disallowance of the interest income received from Armour Pharmaceutical Company as interest and dividends received from subsidiary capital resulting in an increase in petitioner's entire net income.<sup>1</sup>

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1 The basis for the asserted deficiency of Corporation Franchise Tax for the year ended December 30, 1978 was not questioned by petitioner either prior to or during the hearing. Accordingly, it is concluded that the asserted deficiency for the year ended December 30, 1978 is not in issue.

7. In 1979, the Internal Revenue Service concluded final audit adjustments which resulted in an increase in New York State entire net income during the years 1970 and 1972. At the time the Federal audit adjustments were finalized, petitioner was suffering from a staffing problem, inexperienced employees and a substantial workload. These conditions resulted in petitioner's failure to timely notify New York State of the Federal audit adjustments. When the auditor from New York State went to petitioner's premises in 1979, petitioner promptly and voluntarily notified the auditor of the Federal audit adjustments.

8. Petitioner argued at the hearing that since it has had an excellent tax compliance record in New York State and every other taxing jurisdiction in the United States under which it is taxed, no penalty should be imposed.

#### CONCLUSIONS OF LAW

A. That section 208.3 of the Tax Law defines the term "subsidiary" for purposes of section 208.9(a)(1) of the Tax Law as follows:

"The term "subsidiary" means a corporation of which over fifty per centum of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned by the taxpayer;".

B. That, during the years 1976 through 1978, section 208.4 of the Tax Law defined "subsidiary capital" as follows:

"The term "subsidiary capital" means investments in the stock of subsidiaries and any indebtedness from subsidiaries, exclusive of accounts receivable acquired in the ordinary course of trade or business for services rendered or for sales of property held primarily for sale to customers, whether or not evidenced by written instrument, on which interest is not claimed and deducted by the subsidiary for purposes of taxation under articles nine-a, nine-b or nine-c, thirty-two or thirty-three of this chapter, provided, however, that, in the discretion of the tax commission, there shall be deducted from subsidiary capital any liabilities payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, which are attributable to subsidiary capital;".

C. That 20 NYCRR 3-6.2(b), which discusses the definition of a subsidiary, states:

"(b) The test of ownership is actual beneficial ownership, rather than mere record title as shown by the stock books of the issuing corporation. A corporation will not be considered to be a subsidiary because more than fifty percent (50%) of the shares of its voting stock is registered in the taxpayer's name, unless the taxpayer is the actual beneficial owner of such stock. However, a corporation will not be considered a subsidiary if more than fifty percent (50%) of the shares of its voting stock is not registered in the taxpayer's name, unless the taxpayer submits proof that it is the actual beneficial owner of such stock."

D. That Armour Pharmaceutical Company was not a subsidiary of petitioner within the meaning of Tax Law §208.3 and Tax Law §208.9(a)(1) since it did not own any shares of stock of Armour Pharmaceutical Company (see Matter of Texas Instruments, Incorporated, State Tax Commission, June 27, 1980). Similarly, Armour Pharmaceutical Company was not a subsidiary of petitioner within the meaning of 20 NYCRR 3-6.2(b) since there is no evidence that it, rather than Armour-Dial, Inc. had any beneficial interest in Armour Pharmaceutical Company.

E. That upon all of the facts and circumstances presented including the fact that petitioner voluntarily notified the auditor that there had been Federal audit adjustments, it is found that petitioner's failure to timely notify New York State of the Federal audit adjustments was due to reasonable cause and not willful neglect. Accordingly, the penalties imposed, for the years 1970 and 1972, pursuant to Tax Law §1085(a) are cancelled. (It is noted that the result herein may be analogized to the result set forth in 20 NYCRR 9-1.5(4), January 1, 1976, wherein it is stated that reasonable cause may include timely prepared reports which were misplaced by a responsible employee and discovered after the due date.)

F. That petitioner has established that the interest expense attributable to Armour Pharmaceutical Company should be excluded in its interest expense




attributable to subsidiary capital. The definitions of "subsidiary" and "subsidiary capital", noted above, apply to both sections 208.9(a)(1) and 208.9(b)(6) of the Tax Law. Accordingly, the Audit Division is directed to recompute the deficiency of corporation franchise tax by deleting the amount which petitioner attributed to its investment in Armour Pharmaceutical Company when computing the deductions attributable to subsidiary capital.

G. That the petition of Armour & Company is granted to the extent of Conclusions of Law "E" and "F", and is, in all other respects, denied. The Audit Division is directed to modify the notices of deficiency in accordance herewith.


DATED: Albany, New York

APR 04 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER